IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI EX REL. ATMOS ENERGY CORPORATION, ET AL. Appellants, vs. PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, ET AL., Respondents	)	
and	)	SC84344
AMEREN CORPORATION AND UNION ELECTRIC COMPANY, D/B/A AMERENUE, Appellants, vs. PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, ET AL., Respondents	)	

Appeal from Cole County Circuit Court, Division I;
Transfer from Missouri Court of Appeals, Western District,
Case No. WD59196 consolidated with WD59197,
Ordered April 23, 2002.

SUBSTITUTE REPLY BRIEF OF APPELLANTS ATMOS ENERGY CORP., MISSOURI GAS ENERGY, LACLEDE GAS CO., AND TRIGEN-KANSAS CITY ENERGY CORP.

Gary W. Duffy MBE # 24905
Brydon, Swearengen & England P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, Missouri 65102
Phone: (573) 635-7166
Fax: (573) 635-3847
Attorneys for Appellants Missouri Gas Energy and Laclede Gas Company

Michael C. Pendergast MBE # 31763
Laclede Gas Company
720 Olive Street, Room 1520
St. Louis, Missouri 63101
Phone: (314) 342-0532
Fax: (314) 421-1979
Attorney for Appellant Laclede Gas Co.

Robert J. Hack MBE # 36496 Jeffrey A. Keevil MBE # 33825

Missouri Gas Energy
3420 Broadway
Kansas City, Missouri 64111
Phone: (816) 360-5755
Fax: (816) 360-5536
Attorney for Appellant Missouri Gas Energy

Stewart & Keevil, L.L.C.
1001 Cherry St., Suite 302
Columbia, Missouri 65201
Phone: (573) 499-0635
Fax: (573) 499-0638
Attorney for Appellant Trigen-Kansas City Energy Corp.

James M. Fischer MBE# 27543
Fischer & Dority P.C.
101 Madison Street, Suite 400
Jefferson City, Missouri 65101
Phone: (573) 636-6758
Fax: (573) 636-0383
Attorney for Appellant Atmos Energy Corporation

June 19 , 2002

Table of Contents

Introduction 2

Argument 2

Point I 2

Point II 16

Point III 19

Point IV 21

Point V 22

Point VI 27

Point VII 28

Point VIII 30

Conclusion 31

Certificate of Service 32

Certification Regarding Rule 84.06(c) 33

Appendix A

Introduction

Appellants Atmos Energy Corporation, Missouri Gas Energy, Laclede Gas Company, and Trigen-Kansas City Energy Corporation respond herein to the Substitute briefs of Respondent Missouri Public Service Commission ("Respondent" or "Commission") and the Office of the Public Counsel ("Intervenor-Respondent" or "OPC"). Due to the limitations imposed by Rule 84.06, this brief may not refer to all assertions of Respondent and OPC, but that does not indicate acquiescence in them. Since OPC's arguments largely duplicate the Commission's, responses are limited to unique claims. Reference to "the Rules" and "the Rule" is the same as in the initial brief. Appellants do not respond to issues unique to Appellant AmerenUE.

Argument

Point I: § 386.250(6) RSMo Required Evidence as to Reasonableness and The Use of Sufficient Contested Case Procedures

The Commission presents multiple arguments, some of which were not made earlier in this proceeding, and thus are now being raised for the first time before this Court.

1. **Alleged Failure to Preserve Issue** (Brief, p. 29): Respondent asserts that Appellants "failed to preserve" a due process argument. This should be disregarded for two reasons. First, the allegation itself is a violation of Rule 83.08(b), which says a substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief... ." Respondent made several claims under this Point at the Western District, but not this one. Second, Respondent erroneously assumes Appellants claim denial of *constitutional* due process under this Point. The claim by Appellants is

that they were "completely deprived of their statutory due process rights ... ." (Appellants' Brief, pp. 30-31).

2. **Adjudicative Process vs. Rulemaking** (Brief, p. 29): Respondent contends adjudicative processes do not apply in any rulemaking. Relying upon a 1915 case, Respondent essentially argues there is no "right to be heard" in legislative matters because society has power over "those who make the rule." Presumably, this means those affected by the legislative act can vote the legislator out of office. That reasoning cannot apply to this situation since the Commissioners are appointed rather than elected and cannot be voted out of office if someone disagrees with their policies. § 386.050 RSMo.

Respondent then quotes a commentator regarding constitutional due process matters. This is irrelevant because Appellants have not alleged deprivation of constitutional due process in this Point. Instead, Appellants have demonstrated that the statutory procedures required for the enactment of Commission rules under § 386.250(6) RSMo were not followed. The facts as to the procedure the Respondent followed in the rulemakings are not in dispute. The Commission engaged in and allowed *some* "contested case" procedures to take place in the rulemaking, even to the point of enforcing discovery, but denied the procedures which could have produced "evidence" as required by the controlling statute.

3. **Chapter 536 Requirements** (Brief, p. 31): To deflect the consequences of Respondent's failure to comply with § 386.250(6) RSMo, Respondent draws a bright line between rulemaking and adjudication, essentially saying elements of the two can never be mixed. It cites no controlling authority (merely a commentator) for this proposition.

Respondent argues the only process requirements for promulgating rules are those found in Chapter 536 RSMo. This totally ignores the *specific* statutory conditions which can be placed on the authority of an agency to even engage in rulemaking. Those are not found in Chapter 536. They are found in the sections pertaining to each agency and they vary with each agency. Respondent's argument essentially reads those specific provisions out of existence.

The General Assembly *specifically directed* Respondent to hold an *evidentiary* hearing regarding rules made under authority of § 386.250(6) RSMo. Respondent acknowledged this when it told the Western District on page 30 of its brief there that "The requirements of Chapter 536 apply *in the absence of specific legislative requirements* for agency rulemaking." (Emphasis supplied) Respondent omitted that statement from its brief here.

Respondent claims (Brief, p. 32) that the term "rule" as defined in Chapter 536 does not include an order in a contested case. A rule, by definition, has general applicability. A decision in a contested case does not. What Respondent cites simply means a *decision* in a contested case is not, by definition, a "rule." That said, the argument proves nothing here. It does not prove that something called "contested case" procedures can *never* be employed or statutorily required in a rulemaking. No Missouri statute, or other controlling authority in Missouri, says that.

The General Assembly ultimately determines the specific procedures for both rules and contested cases. For example, if the General Assembly passes a specific law saying that rulemaking hearings for a particular agency shall be held at high noon on the front lawn of the Capitol, that requirement must be followed. That is true even if Chapter 536 is silent on where hearings shall take place, or even if they are to be held. The specific controls over the general.

This is also why Respondent is incorrect when it argues (at p. 32) that an overlay of contested case procedures in a rulemaking would be counter to legislative intent. This is similar to what Respondent told the Western District (p. 33 of its brief there); that contested case procedures would "interfere with the process." Obviously, if the General Assembly chooses to *specifically* require an evidentiary hearing in the context of a rulemaking proceeding for a *specific* agency, it can do so and such a requirement will be binding upon that agency. Respondent points to no controlling authority which prohibits the Legislature from doing that.

4. **Chapter 386 Requirements** (Brief, p. 35): Respondent asserts that there is no requirement for a hearing "for the type of rules the Commission promulgated in this case." It says the "type of rules" here "address how a utility deals with bookkeeping, accounting and other corporate matters." Attempting to draw a distinction so as to avoid the requirement for a hearing, Respondent asserts (p. 36) that § 386.250(6) prescribes "how a utility treats its end-use customers" and implies the Rules do nothing of the sort. OPC concurs (Brief, p. 35). The Commission and OPC have obviously overlooked what the Rules actually do.

There are a number of Rule provisions which prescribe conditions for rendering public utility service. In other words, they govern how a gas utility is to render transportation and other utility services to its customers and third parties. *See*, 4 CSR 240-40.016(2). Among others, these include provisions specifying:

- how the utility must process requests for transportation service in order to avoid the granting of a preference to any customer; (*subsection (E)*);
- how the utility must administer its transportation tariffs generally, including those

relating to curtailment priority (i.e., when service to customers can be shut off), in order to accomplish the same result (*subsection (D)*);

- how the gas utility must disclose transportation-related information to customers using a marketing affiliate (*subsection (G)*);
- how and under what circumstances the utility may provide a rate discount to a transportation customer, including the specific reporting requirements that must be maintained in connection with such transaction (*subsection (H)*);
- how the utility must administer any discretionary waivers under its transportation tariffs in order to avoid the granting of any preference to a customer (*subsection (L)*); and
- how a utility must communicate in order to ensure the customer will not expect to receive any advantage or preference as a result of doing business with an affiliate of the utility *(subsection (N)*).
- Similarly, 4 CSR 240-80.015, the steam heating rule, contains certain conditions for rendering public utility service. Among these are provisions specifying how a utility must communicate in order to ensure the customer will not expect to receive any advantage or preference as a result of doing business with an affiliate of the utility, and how and what customer information shall be made available.

Obviously, each and every one of these provisions "prescribe conditions of rendering utility service" within the meaning of §386.250(6). Respondent offered no argument in its brief to the contrary.

In contrast to subsection (6), subsection (7) doesn't mention either rulemaking or the specific subject matter of the Rules. Respondent claims (p. 36) that "it proceeded under § 386.250(7), its

broad enabling statute and not under § 386.250(6) because that section applies only to rules concerning conditions of rendering utility service... ." The discussion immediately above proves the Rules concern conditions of rendering utility service, so the Commission cannot legitimately claim it could proceed under (7) when (6) clearly applies to at least some of the Rules' provisions.

Subsection (7) says, in its entirety: "To such other and further extent, and to all such other and additional things, and in such further respects as may herein appear, either expressly or impliedly." That is not a grant of rulemaking authority. It is not even a clear directive that the Commission is supposed to do anything in particular. That provision was present long before the addition of what is now (6). In RSMo 1959, § 386.250 read as follows:

> The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:
>
> * * *
>
> (9) To all public utility corporations and persons whatsoever subject to the provisions of this chapter as herein defined. And to such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly.

Read in context as originally enacted, especially since § 393.140(12) existed at the same time, that phrase in subsection (7) does not indicate any intention of the General Assembly to grant implied authority to make rules on the subject matter of § 393.140(12), particularly in view of the specific rulemaking provisions that exist elsewhere in the Public Service Commission law. Indeed, had the General Assembly believed that subsection (7) granted Respondent the broad rulemaking authority

Respondent now claims, there would have been no need for the specific grant of authority in subsection (6). By specifically granting Respondent rulemaking authority in subsection (6), under the maxim of *expressio unis est exclusio alterius*, any other rulemaking authority pursuant to § 386.250 was excluded.

Respondent originally told the world its authority came from "§ 386.250 RSMo Supp. 1998 and § 393.140 RSMo 1994." (L.F. 19, 498, 688, 1017). Respondent did not specify any subsection(s). Section 386.250 has seven and § 393.140 has 12. Each are substantially different from the others. Only three even mention authority for rules. One is § 386.250(6) which has been discussed at length. The other two are subdivisions (11) and (12) of § 393.140. Both of those mention rulemaking, but the scope of authority is very restricted in each and does not, under any stretch, cover the subject matter of the Rules.

Appellants naturally assumed Respondent would rely on explicit rulemaking authority, especially in the absence of any statutory indication that the General Assembly wanted the Commission to enact these Rules. As also discussed under Point VII, § 536.021.2(2) RSMo required Respondent to cite "the legal authority upon which the proposed rule is based." Failure to comply with the procedures in § 536.021 deprives a regulation of validity. See, § 536.021.7 RSMo; ***St. Louis Christian Home v. Mo. Comm'n on Human Rights***, 634 S.W.2d 508 (Mo. App.W.D. 1982). The Respondent cited to "a forest" of 19 subsections and then waited until a court challenge to reveal which "tree" it was using. Respondent's conduct of concealing its claim of authority in a gnarly thicket of subsections certainly does not further the purpose of public participation in rulemakings.

The Commission has no power except that granted by its creator, the General Assembly.

State ex rel. Springfield Warehouse & Transfer Co. et al. v. PSC, 225 S.W.2d 792, 794 (Mo. App. 1949). In voiding a longstanding rule of the Commission there, the court said adoption of an administrative rule by Respondent "can only be legally authorized upon the grounds that the Legislature has directly, or by necessary or reasonable implication, authorized the same." ***Id.*** "The Legislature has declared the public policy of this state ... . Respondent is merely the instrumentality of the Legislature, created for the purpose of carrying out that policy. It has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the Legislature." ***Id.*** "The Legislature alone has the power to declare the general law relating to this subject, and respondent must observe same. If the interests of the public require a change in the law in this respect, then it is a matter for appropriate action by the Legislature ... ." ***Id*** at 795.

The General Assembly long ago recognized, through passage of § 393.140(12) RSMo, that utilities should be able to carry on other businesses free of Respondent's involvement. That subsection provides a complete regulatory framework where the Rules under review here are neither authorized nor required. Significantly, the General Assembly has never given *explicit* authority to the Respondent to adopt the type of rules presented in this appeal. The Commission apparently agrees, since it claims in its brief that its authority is only "implied."

Rules Adopted Without Express Grant of Authority: Subsection (12) of § 393.140 RSMo is clear legislative recognition that the other businesses of utilities are not subject to the jurisdiction of the Respondent if they are "substantially kept separate and apart" from the utility operations. Respondent has never made any evidentiary-based determination that affiliate operations of

any utility affected by the Rules are not "substantially kept separate and apart." It has nevertheless proceeded in these Rules to assert its jurisdiction over other businesses.

Missouri courts have held that the power of an agency to make rules may be implied "only if it necessarily follows from the language of the statute." ***Pen-Yan Investment, Inc. v. Boyd Kansas City, Inc.***, 952 S.W.2d 299, 304 (Mo.App.W.D. 1997). In matters involving Respondent's authority, this Court has employed a strict requirement of explicit authority. In ***State ex rel. UCCM, Inc. v. PSC,*** 585 S.W.2d 41 (Mo. banc 1979), when both the Commission and utilities claimed there was *implicit* authority for a fuel adjustment clause, this Court said: "Respondents themselves have difficulty pointing to what provisions in the statutes give them authority ... ." ***Id.*** at 54. Respondents "admitted that it was hard to find specific sections authorizing [its decision], but that we should approve it ... through application of the principle that where an agency is given broad supervisory authority, deference should be given to its interpretation of a statute." ***Id.*** This Court responded, saying "it is for the legislature, not the PSC, to set the extent of the latter's jurisdiction." It noted that "The mere fact that the commission has approved similar clauses in the past, or that other states permit them, is irrelevant if they are not permitted under our statute." ***Id.*** Therefore, this Court has already held that there must be *specific* rather than implied legislative authority for Respondent's actions.

Only rules promulgated by an administrative agency with properly delegated authority have the force and effect of law. ***Psychare Mgt. v. Dept. of Social Services***, 980 S.W.2d 311, 313 (Mo. banc 1998). An agency's authority is limited to that granted by statute and any regulation promulgated must be within the authority of statute. The rules or regulations of a state agency are invalid if they are

beyond the scope of authority conferred upon the agency. ***Pharmflex v. Div. of Employment Security***, 964 S.W.2d 825, 829 (Mo.App.W.D. 1997).

The General Assembly has conferred *explicit* rulemaking authority on Respondent only in a few select areas and has remained silent in others. It has never enacted an explicit, broad grant of rulemaking authority to Respondent. Instead, the General Assembly has sought to rein in Respondent and other agencies with the enactment of § 536.014 RSMo in 1997. It says "[n]o ... agency ... rule shall be valid in the event that ... [t]here is an absence of statutory authority for the rule or any portion thereof ... ." As a result, the only supportable conclusion is that no such authority for the Rules can be implied from § 386.250(7) RSMo.

This conclusion is also bolstered by the fact that the Legislature enacted provisions in 1998 specifically regarding utility affiliates. Respondent was granted rulemaking authority to administer *those specific provisions* regarding affiliates in § 386.756 RSMo. But its authority there was circumscribed by the phrase: "the commission shall not impose by rule or otherwise, requirements regarding HVAC services that are inconsistent with or in addition to those set forth" in the Act. By acting to grant only limited authority regarding affiliates under § 386.756 RSMo, and by intentionally limiting any rulemaking grant in § 393.140(12) RSMo, to only those specific circumstances where the Commission wishes to exempt a corporation from making "full reports" concerning any "inconsiderable" utility business it may have, the only conclusion that can be fairly reached is that the General Assembly did not intend to grant Respondent the broad *implied* authority it claims.

5. **Chapter 393 Requirements** (Brief, p. 36): In a very short discussion, Respondent says "the subsections in § 393.140 under which the Commission acted required (sic) did not require

hearings." Respondent uses the plural "subsections" which indicates it relies on more than one subsection. This is confusing because Respondent only discusses two: (5) and (11). On p. 67, Respondent says (5) "does not provide the statutory authority for the rules." With (5) thus eliminated, only (11) remains. Respondent appears to only obliquely claim authority there, simply noting (p. 37) that "subsection 11 generally applies to rules." It directs attention to ***McBride & Son Builders v. Union Electric Co.***, 526 S.W.2d 310 (Mo. 1975).

Subdivision (11) **does not apply to the subject** of the Rules. It at least *mentions* rulemaking, which is more than can be said for § 386.250(7), but the scope is very restricted. It says "The commission shall also have power to establish such rules and regulations, *to carry into effect the provisions of this subdivision,* as it may deem necessary ... ." (Emphasis supplied) As discussed in Appellants' initial brief (pp. 54-55), subdivision (11) deals with rate schedules, not affiliates. The subject of affiliates in subdivision (12) cannot be the subject of rulemaking authority which is expressly limited to subdivision (11). As the Commission notes on p. 69, ***McBride*** says "subsection (11) is primarily concerned with rulemaking, and prohibiting any form of contract or agreement except such as are regularly and uniformly extended to all persons and corporations under like circumstances." ***Id.*** at 313. That generalization is woefully insufficient to support a conclusion that (11) is broad enough to authorize rules regarding affiliates of a utility which are addressed specifically in a different subdivision.

6. **Commission Hearings** (Brief, p. 37): Respondent claims § 386.250(6) RSMo "refers to a legislative type hearing." Its cited authority is simply a commentator discussing rulemaking

in general, not the specific terms of § 386.250(6) RSMo. Respondent's argument proves nothing.

Respondent then proceeds (p. 39) to parse the phrase "a hearing shall be held at which affected parties may present evidence as to the reasonableness of any proposed rule." Respondent amazingly claims that *if* the Legislature wanted more than a legislative-type hearing, it would have said so. Respondent obviously ignores the portion which says affected parties will have the opportunity to present "*evidence* as to the reasonableness" of the rules. Appellants have already discussed at length what "evidence" means in this connection. Respondent completely reads that out of the statute.

Respondent argues (p. 39) it nevertheless held hearings at which evidence of reasonableness was taken. Respondent's idea of "evidence" is one-sided and inconsistent with its accepted meaning. It allowed only some, but by no means all, of the essential procedures required to produce evidence. This is the same type of unlawful, truncated conduct it engaged in when it provided a limited hearing in ***State ex rel. Fischer v. PSC***, 645 S.W.2d 39 (Mo. App. W.D. 1982). Here, Respondent allowed "sworn statements" and enforced discovery, but completely prohibited cross-examination. As demonstrated in the initial brief, this does not produce "evidence." As the Western District said in ***Fischer***, courts have "authority to examine acts of the Public Service Commission for due process violations. ... One component of this due process requirement is that parties be afforded a full and fair hearing at a meaningful time and in a meaningful manner. " ***Id***. at 43. Just as with ***Fischer***, the hearings here were "not meaningful" because all of the "evidence" was not allowed to be presented since cross-examination was prohibited.

Respondent argues "as a final point" (p. 40) that § 386.410.1 RSMo absolves it from any impropriety in the taking of testimony at hearings. This argument appears to violate Rule 83.08(b) since

Respondent made no such allegation at the Western District. Even if it is not barred by Rule 83.08(b), the provision does not stand for the proposition cited. It says "No *formality* in any proceeding nor in the manner of taking testimony ... ." (Emphasis supplied). So it means "No formality in the taking of testimony." The issue regarding the *taking of testimony* here is the total absence of cross-examination. The Commission therefore is saying that cross-examination is merely a "formality" in American law. That is absurd on its face.

7. **Evidence argument** (Brief, p. 40): Respondent attempts to discredit the holding in ***State ex rel. Kansas City Public Service Co. v. Waltner***, 169 S.W.2d 697, 703 (Mo. 1943) by claiming Appellants overstate its holding. The quotation from the case was accurate. Respondent then resorts again to general commentators discussing "legislative facts and adjudicative facts." It tries again to draw an imaginary bright line between rulemaking and adjudication. This has no bearing on a specific statute which requires a "hearing" and "evidence." The intention of the General Assembly, specifically expressed, must control.

Particular OPC Arguments: On page 34, OPC apparently claims clairvoyance. It notes Respondent claimed authority for the Rules in an order (L.F. 443-447) in which Respondent said it was proceeding under its "general authority." Respondent cited no subsection in the referenced order. Yet OPC -- a separate agency from the Respondent -- was amazingly able to conclude Respondent was referring to § 386.250(7). It is strange that OPC was able to divine a reference to one specific subdivision.

On p. 60, OPC purports to offer additional statutory authority for the Rules that Respondent does not even claim. This highlights the problem since it throws it open to anyone to suggest a source

of authority -- even authority the agency did not rely upon in the first place. OPC erroneously says authority can be found in subsections (1) and (4) of § 393.140 RSMo. Neither can be the source, however, because neither contain an express grant of rulemaking authority and the subject matter is not connected to the Rules.

Point II: Failure to Comply With § 536.021.2 and § 536.021.6(4) RSMo

Respondent contends it satisfied § 536.021.2 RSMo when it simply said: "This rule is intended to prevent regulated utilities from subsidizing their non-regulated operations." As Appellants have indicated (Initial Brief pp. 33-34), this is a half-truth because Respondent *already* had that authority, and exercises it when it prescribes rates. See, ***State ex rel. General Telephone Co. of the Midwest v. PSC***, 537 S.W.2d 655 (Mo.App. 1976). Respondent even cites and relies upon this case on page 51 for that proposition, where it also erroneously claims authority to set reasonable rates under § 386.130 RSMo. No such authority resides in that section.

If Respondent had provided an *explanation* of the proposed rule, and a statement of the *reasons* why the rule was necessary, as contemplated by § 536.021.2 RSMo, it presumably would have addressed the power it already had to prevent subsidization, identified areas in which the Respondent deemed that existing power to be insufficient, and explained how the proposed rule would address those perceived deficiencies. The Respondent made no such attempt.

Respondent asserts its claimed "reason" passes the test in State ex rel. City of Springfield et al. v. PSC , 812 S.W.2d 827 (Mo.App.W.D. 1991). The holding in that case should be reviewed by this

Court because it does not adequately reflect the intentions of the General Assembly in enacting these requirements. In Springfield , the court treated the statutory requirement for an "explanation" and a "reason" as being satisfied with the briefest of summaries since it erroneously perceived the "purpose"of those requirements was simply "to allow opportunity for comment." This was clearly not the Legislature's intention. The requirement for "explanations" and "reasons" are *separate* and *independent* and accompany the *full text* of the proposal. The full text provides adequate opportunity for comment on the text itself, but does not necessarily reveal the motive or justification of the agency. The Legislature specifically required "explanations" and "reasons" *in addition to* the full text. The holding in ***Springfield*** negates that and thus needs to be re-examined. What the Respondent provided simply does not meet the statutory requirements. Further, Appellants incorporate by reference here their argument under Point VII in this brief. Simply saying the requirements only accomplish "notice," and that participation satisfies the notice requirement so there is no harm if there is participation, essentially requires the Court to ignore the specific statutory requirements and their consequences.

Respondent contends it satisfied § 536.021.6(4) RSMo. It points to the "Responses" it published in the various orders of rulemaking. These "Responses" may be responses to arguments made by those who commented on the rules, but that does not transform "responses" into "findings." The term "findings" denotes some determination or decision, whereas a "response" may be merely a reply. Furthermore, the statue requires a "concise summary of the state agency's findings." As stated in the substitute initial brief, no summary of findings, concise or otherwise, appears in the Orders of Rulemaking.

Particular OPC Arguments: OPC cites ***St.Louis Christian Home v. Mo. Commission on Human Rights***, 634 S.W.2d 508, 515 (Mo.App. 1982) for essentially the same premise as ***Springfield***, but also the additional argument that there has to be some claim of detriment in the ability to participate in or react to the rulemaking at issue. OPC says Appellants fully participated in the rulemaking and therefore had no such detriment. To the contrary, Appellants have always claimed Respondent did not give a sufficient explanation of the Rules or the reasons why the Rules are considered necessary since Respondent already possesses the ability to prevent subsidization through rate-setting. Appellants thus were deprived of the ability to completely explore and provide evidence on the agency's rationale because it was never divulged.

Point III: Violation of § 536.016 RSMo.

Respondent agrees that § 536.016 RSMo applies to agencies from and after August 28, 1999. (Brief, p. 63). Respondent also acknowledges that § 536.016 applies "from the point reached [in a case] when the new law intervened." (Id.) Respondent held its "hearings" in this case in mid-September 1999 -- after the statute became effective. Respondent nevertheless boldly seeks to escape *totally* from the terms of § 536.016 because it "proposed" the Rules before the law became effective. (Brief, p. 64). The Respondent's theory is without merit.

There are two subsections to § 536.016. The first one says

> 1. Any state agency shall propose rules based upon substantial evidence on the record and a finding by the agency that the rule is necessary to carry out the purposes of the statute that granted such rulemaking authority .

(Emphasis supplied). Respondent claims it escapes this requirement simply because it "proposed" the Rules on June 1, 1999. This is too strict a reading by Respondent. The statute does not say that "substantial evidence on the record" has to take place *before* the filing of a notice of proposed rulemaking. A more reasonable interpretation is that before any such rule is finally adopted, there must be "substantial evidence on the record and a finding that it is necessary to carry out the purposes of the statute." Indeed, how can there even be any "substantial evidence on the record" regarding a rule until after the proposal is made public through the notice? Respondent therefore *could* and *should* have complied with this provision when it held its "hearings" in mid-September 1999, after the statute took effect. That does not even require a "retrospective" application of § 536.016.

Respondent's other arguments about § 536.016 are merely speculation about what the General Assembly intended and an attempt to evade the requirements imposed. "Substantial evidence on the record" is a phase which clearly connotes an adjudicatory type process within the context of a rulemaking proceeding, which also supports the argument of Appellants under Point I.

Respondent's argument that the section is "completely separate" from the notice procedures in § 536.021 RSMo simply seeks to read the text of § 536.016 out of existence and somehow make it "apply to a process outside of the actual making of the rule." (Brief, p. 62) This claim is contrary to the plain language which says it applies when a "state agency shall propose rules."

Another altered claim: Respondent told the Western District that § 536.016 "is a procedural statute." (W.D. Brief, p. 48). Respondent made no claim there of the statute having any substantive nature. Altering its claim here, Respondent now says it is "substantive in nature" and "a substantive law." (Brief, p. 65). Altered claims such as this are barred by Rule 83.08(b).

Point IV: Violation of § 393.140(5) RSMo.

The Commission says § 393.140(5) RSMo does not apply to the Rules. (Brief, p. 67). Appellants explained the applicability in the initial brief.

Rather than directly responding, Respondent claims (p. 68) that ***McBride & Sons***, *supra*, is controlling. The operation of subsection (5) was not central to the holding in ***McBride*** and therefore is dicta. This Court first said the utility could not challenge a Commission "general order" (which for these purposes is the same as a rule) in a declaratory judgment proceeding. That ruling was sufficient to dispose of the case by itself. Then it said Respondent had authority under *subsection (11)* to make the general order under review there, because it dealt with a form of contract or agreement.

Nevertheless, ***McBride & Sons*** is in accord with Appellants' position. Subsection (5) sets out Respondent's authority to determine improper or discriminatory conduct. It provides the procedure by which Respondent can determine, after a contested case proceeding, whether any acts are unreasonable or unduly preferential. But it requires "acts" by a utility before remedial action. This is another instance where the Legislature has provided a mechanism, other than rulemaking, which Respondent can utilize to pursue allegations of inappropriate conduct by a utility. The General Assembly recognized in subsection (5) that there should be a trial-type evidentiary hearing, based on evidence, before any remedial measures could be instituted. As Appellants have explained, Respondent improperly seeks to short-circuit that mandated procedure with the Rules.

Therefore, subsection (5) applies to the subject matter of the Rules. Subsection (11), as discussed in Point I, does not. Subsection (11) may not require a hearing for a rulemaking, as

Respondent says, but that is irrelevant here since (11) does not grant rulemaking authority over affiliate transactions, which is the subject of the Rules.

Point V: Beyond Subject Matter Jurisdiction

The lengthy response provided by Respondent on this Point, beginning on p. 43, does not suggest anything contrary to the position of the Appellants. None of the cases Respondent cites demonstrate that Respondent has *implicit* authority to impose requirements upon an un-regulated affiliate of a gas or steam utility company, or grant the Respondent any authority over any aspect of interstate commerce.

The two decisions cited at page 46 do not aid Respondent's position. These only hold that Respondent may, in setting utility rates, ignore the costs of goods or services purchased from an affiliate, *provided* that Respondent holds an evidentiary hearing and determines, based on *evidence*, that the costs are excessive. There is *nothing* in the decisions which even hints Respondent may, *through rules*, establish bookkeeping requirements for a utility's unregulated affiliate or require that the records of the affiliate be produced, especially in light of the clear language of § 393.140(12) regarding such affiliates.

State ex rel. ANG v. PSC, 706 S.W.2d 870 (Mo.App.W.D. 1985) cited on page 47 is similar. In ***ANG***, the Western District simply found that, in a rate setting case, the regulated utility could be assigned the cost of capital of its unregulated parent corporation. *This does not mean an unregulated affiliate of a utility can be required to keep records in a particular manner*

or produce them. The case merely held that facts relating to the unregulated affiliate can be taken into account after evidentiary hearing in deciding what rates the regulated utility may charge its customers for a regulated service. If anything, these decisions illustrate Appellants' point that, in contrast to the Rules, there are other adequate avenues readily available to the Respondent through which it can effectively and *lawfully* address affiliate transactions and their impact on ratepayers, without exceeding its jurisdiction as it did here.

Respondent claims Appellants did not preserve a claim involving § 386.030 or federal preemption in an application for rehearing, and thus it was not preserved for appellate review. (Brief, pp. 52-53). Respondent is mistaken. Appellants made the specific claim in paragraph 6.C. of an application for rehearing. (*See*, L.F. 985-986). Respondent fails to note that filing when it cites other applications for rehearing on p. 53. Appellants specifically mentioned the topic of "preemption" and "federal rules governing" off-system commodity sales and capacity releases from pipelines. What § 386.500.2 RSMo requires is the "specific ground" on which the applicant considers the decision to be unlawful. The specific ground is "preemption by federal rules or statutes." There is no statutory requirement that a utility essentially file an appellate brief as an application for rehearing.

Although Appellant's point in the application for rehearing was <u>not</u> general or imprecise, even "extremely general and imprecise" language can be sufficient to preserve a claim of error. ***State ex rel. Chicago, R.I., & Pac. R.R. Co. v. PSC***, 441 S.W.2d 742 (Mo.App. 1969). The FERC regulations cited in Appellant's brief are simply support for the argument that Respondent is exceeding its jurisdiction. The purpose of the statute is to make Respondent aware of errors and provide a chance for Respondent to correct them. Respondent, an intervenor in cases before the FERC involving

interstate pipelines, cannot hide behind a claim ignorance.

In summary, Respondent attempts many oblique and erroneous attacks on this Point, but never directly addresses the substance of Appellants' arguments about the Rules.

Particular OPC Arguments: OPC indicates on pp. 63-64 that because Respondent "has dealt with" transactions with affiliates in prior rate cases, that does not prohibit Respondent from making requirements in rules "so the information will be available in the rate setting process." If the Rules were only about preserving information on those transactions, it is unlikely this appeal would exist. It should be apparent to anyone reading the Rules that they go far beyond simply preserving information in the possession of the utility -- a requirement to which the Appellants have never objected.

OPC claims on p. 65 that only regulated utilities are "required to comply" with the rules. This overlooks the provisions, for example, described on p. 46 of Appellants' initial brief which require regulated utilities to "ensure" affiliates keep their records in a certain way.

OPC claims the Rules make no imposition on the unregulated affiliates of utilities, and cites subsection (6)(A) "of Rule 015." OPC ignores, however, subsection (6)(B) which purports to give the Commission authority to audit the affiliate's books and investigate the affiliate's operations, all without mention of "to the extent permitted by applicable law" upon which OPC rests its subsection (6)(A) argument. OPC also ignores subsection (2)(F) of "Rule 015" which imposes specific requirements on an affiliate's "marketing materials, information or advertisements."

OPC claims on p. 66 that the asymmetrical pricing standards apply only to the regulated utility and, apparently on that basis alone, must be within the Commission's jurisdiction. A huge flaw in this

argument, of course, is that the Commission's jurisdiction in the pricing arena applies only to those goods and services offered to the public generally by gas and heating corporations. The basis of Appellants' argument is that the Commission seeks by these rules to impose asymmetrical pricing standards on transactions relating to goods and services that are **not** offered by gas and heating corporations to the public generally. The scope of the asymmetrical pricing standards therefore exceeds the Commission's pricing authority.

OPC next claims, on p. 67, that because the segments of the rules governing the provision of "information" by gas and heating corporations do not apply to non-regulated affiliates, but only apply to gas and heating corporations, such segments must be within the Commission's jurisdiction. The basis of Appellants' argument in this regard is that there is no statutory authority whatsoever to support the Commission's adoption of rules to control or dictate the use of information in the possession of gas and heating corporations. Certainly § 393.140(1), a subsection worded in the most broad terms, does not offer any support for such Commission authority; it makes no mention whatsoever of either "information" or rulemaking authority.

On pages 67 and 68, OPC claims the provisions concerning off-system commodity sales and capacity release transactions must be jurisdictional because "[A]ll these sections do is require the regulated utility to offer these particular services on comparable terms to both affiliate and nonaffiliated marketers." A huge problem with this, and a fact ignored by OPC, is that the off-system commodity sales and capacity release transactions addressed by these sections of the rules are interstate in nature and beyond the jurisdiction of the Commission by virtue of § 386.030 and the federal constitution.

On page 69, OPC again raises the broadly worded provisions of § 393.140(1), this time as support for the sections requiring gas and heating corporations to maintain information and records regarding activities of another corporation or entity. As with OPC's earlier use of this subsection, § 393.140(1) contains no reference to "information" or rulemaking authority and therefore offers no support for the proposition asserted. Appellants' argument is, and remains, that the provisions of the Rules requiring gas and heating corporations to maintain information and records regarding activities of another corporation or entity is unsupported by statutory authority. The validity of this argument is not in any way impaired by OPC's suggestion that the gas and heating corporations need only to maintain the information of which they are aware (of course it would be well nigh impossible to maintain information of which one is "unaware").

Point VI: Impermissibly Vague, Ambiguous and Inconsistent Provisions

Respondent contends (p. 81) that Appellants failed to preserve for appeal the issue of vagueness by failing to specifically cite a constitutional provision in the application for rehearing. Appellants made the claim that terms in the Rules were unconstitutionally vague in an application for rehearing. Paragraph 7 of the document appearing at L.F. 986-988 sufficiently describes the vagueness claims by identifying the objectionable terms and claiming they are unconstitutionally impermissible. Even "extremely general and imprecise" language can be sufficient to preserve a claim of error. ***State ex rel. Chicago, R.I., & Pac. R.R. Co. v. PSC***, 441 S.W.2d 742 (Mo.App. 1969). Appellants specifically cited the constitutional provisions on page 21 of their initial brief before the

Circuit Court, filed March 28, 2000; the first appellate review of the issue. (See **Appendix A**, p. A-1.) Respondent filed a responsive brief on May 1, 2000 in which it failed to make this specific claim of failure to preserve. Respondent then proceeded to present essentially the same argument it has here on the same question. (See **Appendix A**, pp. A-2 to A-6). Under those facts, ***Fitzgerald v. City of Maryland Heights***, 796 S.W.2d 52 (Mo.App. 1990) does not apply.

Respondent also contends the issue is not "ripe." Appellants anticipated this and fully addressed it on pp. 50-53 of their initial brief. The other argument Respondent makes is that it disagrees whether the particular terms are vague. Since it was the author, it would naturally take that position. Its discussion does not make those terms any clearer.

Point VII: Cited Authority Does Not Authorize Adoption of the Rule

Contrary to the requirement of § 536.021.2(2) RSMo, Respondent failed to cite any provision in its notice of proposed rulemaking that confers authority on it to promulgate rules for heating companies. Respondent claims (p. 92) that "jurisdiction of the Commission over a heating company ... is not the issue" and that citing to its "general enabling statutes" was sufficient. Respondent would apparently claim "legal authority" in the absence of "jurisdiction." Notably, the citation by Respondent to "support" its proposition, ***NME Hospitals, Inc. v. Dept. of Social Services***, 850 S.W.2d 71, 74 (Mo. banc 1993), does not support Respondent's claim or stand for the proposition for which it is cited. Neither of the statutes cited by Respondent in the notice of proposed rulemaking even *refer* to

heating companies, so what it cited, under any interpretation, cannot be its "legal authority" for 4 CSR 240-80.015.

Respondent admits (p. 91) it did not cite § 393.290 RSMo; its source of authority over heating companies. Respondent relies on ***Corvera Abatement Technologies v. Air Conservation Commission***, 973 S.W.2d 851, 855 (Mo. banc 1998) for the proposition that "The notice of proposed rulemaking provides notice to affected parties to allow opportunity for comment by supporters or opponents of the measure, and so to induce a modification." The recent passage of § 536.016 RSMo which requires "a finding by the agency that the rule is necessary to carry out the purposes of the statute that granted such rulemaking authority" clearly shows the General Assembly is concerned about agencies exceeding their authority. The Legislature requires the agency to put down in black and white its justification that what the agency is doing is within the scope of its authority. That demonstrates a legislative intent that the provision is much more than a mere "notice" provision. Furthermore, Respondent's reliance on ***Corvera*** is misplaced. In that case, this Court overlooked the agency's failure to cite proper legal authority because the section cited did, in fact, authorize the agency to adopt rules of the same general subject matter, even though a different section provided "more proper authority." In this situation, however, neither section cited by Respondent provides any authority whatsoever for Respondent to enact rules relating to heating companies in the absence of § 393.290 RSMo..

The General Assembly *specifically* requires agencies to cite "the legal authority upon which the proposed rule is based" and it provides a *specific penalty* if that is not done. The penalty is that the rule is void. § 536.021.7 RSMo. Respondent has admitted it did not cite the section that gives it

authority over the type of utility subject to 4 CSR 240-80.015. That clearly means 4 CSR 240-80.015 is void.

The essence of Respondent's argument is that if someone participates in the rulemaking, it does not matter what the agency claims as authority, because if they participate, there can be no harm from the agency not following the Chapter 536 provisions. Under that logic, the Commission could cite §1.025 RSMo as its authority. If someone participates and points out that § 1.025 RSMo does not authorize administrative rules, the agency then claims it does not matter because the person got to participate in the rulemaking anyway. The same is true with regard to the requirement for an explanation of the rule and the reasons therefor, as explained in Point II, supra. Under that theory, the Commission could have said its reason for these Rules was to prevent UFO's from landing in Jefferson City. If the utilities participate and demonstrate that is not an accurate statement, the agency simply claims there is no harm because the utilities participated. The Respondent's argument (and the theory from ***Springfield***, *supra*, that participation vitiates any requirement to provide correct information) effectively obliterates the statutory requirements for the agency to cite the correct authority and give reasons for its proposal, and also obliterates the penalty specified by the General Assembly if the agency does not.

Point VIII: Western District Had Jurisdiction

Appellants generally concur with the Commission's Point VIII to the extent it corresponds with Appellant's Point VIII and to the extent that the Western District was erroneous in its conclusions.

Appellants strongly disagree, however, with Respondent's arguments where it claims *implicit* rulemaking authority in "many" sections of Chapters 386 and 393 (Brief, pp. 93, 99) and repeats that it has implicit rulemaking authority under § 386.250(7) RSMo (addressed in Point I, supra).

While it may be an issue here whether § 386.250(7) RSMo provides implicit authority for these Rules, the scope of this case is not whether the Commission has implicit authority throughout Chapters 386 and 393 for other *unidentified* future rules. That is an issue which the Commission has chosen to inject here for the first time and it would be patently unfair to require Appellants to address such a broad and vague issue in this reply brief, especially considering the word limitations in Rule 84.06(b).

CONCLUSION

Appellants incorporate by reference the conclusion to their initial brief.

Respectfully submitted,

_____

James M. Fischer MBE 27543
Fischer & Dority, P.C.
101 Madison Street.
Jefferson City, MO 65101
(573) 636-6758 telephone
(573) 636-0383 facsimile
Attorneys for Atmos Energy Corporation

_____

Gary W. Duffy MBE 24905
Brydon, Swearengen & England P.C.
312 E. Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
(573) 635-7166 telephone
(573) 635-3847 facsimile
Attorneys for Missouri Gas Energy and Laclede Gas Co.

_____

Robert J. Hack MBE 36496
Missouri Gas Energy

3420 Broadway
Kansas City, MO 64111
(816) 360-5755 telephone
(816) 360-5536 facsimile
Attorney for Missouri Gas Energy

_____

Jeffrey A. Keevil MBE 33825
Stewart & Keevil, L.L.C.
1001 Cherry Street
Columbia, MO 65201
(573) 499-0635 telephone
(573) 499-0638 facsimile
Attorneys for Trigen-Kansas City Energy Corporation

_____

Michael C. Pendergast MBE 31763
Laclede Gas Company
720 Olive Street Room 1520
St. Louis, MO 63101
(314) 342-0532 telephone
(314) 421-1979 facsimile
Attorney for Laclede Gas Company

Certificate of Service

I hereby certify that two copies of the foregoing in printed fashion and one copy in computer diskette fashion have been either hand-delivered or sent by first class mail this 19th day of June 2002, addressed as follows:

Lera L. Shemwell
Assistant General Counsel
Missouri Public Service Commission
Governor State Office Building
Jefferson City, Missouri

Douglas E. Micheel
Senior Public Counsel
Office of the Public Counsel
Governor State Office Building
Jefferson City, Missouri

James B. Lowery
Phebe La Mar
SMITH LEWIS, LLP
111 South Ninth Street, Suite 918
P.O. Box 918
Columbia, MO 65205-0918

Joseph A. Raybuck
Thomas H. Byrne
Ameren Services Company
P.O. Box 66149
St. Louis, MO 63166-6149

_____
Gary W. Duffy

Certification Regarding Rule 84.06(c)

Pursuant to Rule 84.06(c), the undersigned counsel hereby certifies that this brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b) and that, according to the word count feature in WordPerfect Suite 8, the entire document contains 8,181 words, of which 642 are in the cover, signature block, and certificates, producing a net amount of 7,539. The undersigned also certifies that it is filing with this brief a computer diskette which contains a copy of the foregoing brief, which was prepared using WordPerfect Suite 8, and further certifies that the diskette was scanned for viruses utilizing Norton Utilities software which shows it was virus-free.

_____
Gary W. Duffy MBE 24905
Brydon, Swearengen & England P.C.
312 E. Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102